

- A** **Cempaka Finance Bhd v
Ho Lai Ying (trading as KH Trading) & Anor**
- B** FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 03–1 OF 2004(W)
STEVE SHIM CJ (SABAH & SARAWAK), ABDUL HAMID MOHAMAD
AND PS GILL FCJJ
7 MARCH 2006
- C** *Banking — Security for advances — Guarantee — Conclusive evidence clause — Effect of — Whether a certificate of indebtedness is final and conclusive evidence of the amount in the absence of any manifest error on the certificate*
- D** *Banking — Security for advances — Guarantee — Whether apart from producing a certificate of indebtedness, the appellant had a further obligation to produce statements of account to prove the debt in an application for summary judgment*
- Civil Procedure — Summary judgment — Certificate of indebtedness conclusive — Rules of the High Court 1980 O 14*
- E** *Evidence — Conclusive evidence clause — Effect of — Whether appellant had a further obligation to produce statements of account to prove the debt in an application for summary judgment*
- F**
- G** Under a loan agreement dated 17 July 1996, the appellant agreed to grant the first respondent a fixed loan of RM1.5m. In consideration, the second respondent signed a guarantee agreement on the same date. The first respondent defaulted. The appellant filed a summons in chambers under O 14 of the Rules of the High Court 1980 for summary judgment. The senior assistant registrar granted an order in terms of the application. The respondents then appealed to the judge in chambers who upheld the decision of the senior assistant registrar. On further appeal by the respondents, the Court of Appeal reversed the decision of the High Court. Leave to prosecute this appeal was granted by this court on 23 March 2004 upon the following two questions: (1) whether a certificate of indebtedness issued in accordance with the express provisions of the contract which provide that the certificate is final and conclusive of the matters stated therein is final and conclusive evidence of the amount in the absence of any manifest error on the certificate; and (2) whether apart from producing a certificate of indebtedness, the appellant had a further obligation to produce statements of account to prove the debt in an application for summary judgment.
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Held, allowing the appeal:

- (1) In an application under O 14, the burden is on the plaintiff to establish the

following conditions: that the defendant must have entered appearance; that the statement of claim must have been served on the defendant; that the affidavit in support must comply with r 2 of O 14 in that it must verify the facts on which the claim is based and must state the deponent's belief that there is no defence to the claim. Once those conditions are fulfilled, the burden then shifts to the defendant to raise triable issues. The law on this is trite (see para 5); *Supreme Leasing Sdn Bhd v Dior Enterprises & Ors* [1990] 2 MLJ 36 followed.

- (2) In reversing the burden of proof as the Court of Appeal in the instant case had done, it had misapplied the relevant principles relating to an application for summary judgment under O 14 of the Rules of the High Court 1980 (see para 6).
- (3) A certificate of indebtedness operates in the field of adjectival law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disprove the amount claim (see para 11).
- (4) There was nothing to indicate or suggest any manifest error on the face of the said certificate nor was any fraud shown. In the circumstances and given the authorities cited, the answer to the first question must be in the affirmative whereas the second question had to be answered in the negative (see para 13).

[Bahasa Malaysia summary]

Di bawah satu perjanjian pinjaman bertarikh 17 Julai 1996, perayu bersetuju memberikan responden pertama satu pinjaman tetap sebanyak RM1.5j. Sebagai balasan, responden kedua telah menandatangani satu perjanjian jaminan pada tarikh yang sama. Responden pertama ingkar membayar. Payeru memfailkan satu saman dalam kamar di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk satu penghakiman terus. Penolong kanan pendaftar telah memberikan satu perintah seperti yang dipohon. Responden telah merayu kepada hakim dalam kamar yang mengesahkan keputusan penolong kanan pendaftar. Setelah responden merayu seterusnya, Mahkamah Rayuan telah mengakaskan keputusan Mahkamah Tinggi. Kebenaran untuk merayu telah diberikan oleh mahkamah ini pada 23 Mac 2004 di atas dua soalan: (1) sama ada satu sijil keberhutangan yang dikeluarkan mengikut peruntukan-peruntukan nyata di dalam kontrak yang membenarkan sijil tersebut sebagai muktamad dan akhir bukti amaun adalah bukti muktamad dan akhir jika tiada kesalahan yang nyata dalam sijil tersebut; dan (2) sama ada selain daripada mengemukakan sijil keberhutangan tersebut mengikut peruntukan-peruntukan di dalam kontrak, perayu mempunyai obligasi yang selanjutnya untuk mengemukakan penyata-penyata akaun untuk membuktikan keberhutangan di dalam satu permohonan untuk penghakiman terus.

Diputuskan, membenarkan rayuan tersebut:

- (1) Dalam satu permohonan di bawah A 14, beban bukti adalah pada pihak plaintif untuk memenuhi syarat-syarat berikut: bahawa defendan perlu memasuki kehadiran; bahawa pernyataan tuntutan telah diserahkan kepada

- A** defendan; bahawa affidavit sokongan menuruti k 2 A 14, iaitu ia mesti menentusahkan fakta-fakta atas tuntutan berasas dan mesti menyatakan bahawa di atas kepercayaan deponen tiada sebarang pembelaan kepada tuntutan. Setelah syarat-syarat tersebut dipenuhi, beban kemudiannya dialihkan kepada defendan untuk membangkitkan isu-isu yang harus dibicarakan. Undang-undang ini adalah tetap (lihat perenggan 5); *Supreme Leasing Sdn Bhd v Dior Enterprises & Ors* [1990] 2 MLJ 36 diikuti.
- B**
- (2) Dalam mengemukakan beban bukti seperti yang dilakukan oleh Mahkamah Rayuan di dalam kes ini, ia telah, pada pandangan kami, salah pakai prinsip-prinsip yang relevan berhubung dengan permohonan untuk penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 (lihat perenggan 6).
- C**
- (3) Satu sijil keberhutangan beroperasi di medan undang-undang adjektival. Ia memberi alasan kepada plaintif daripada keperluan yang selanjutnya untuk mengemukakan bukti keberhutangan. Sijil sebegini mengalihkan beban bukti kepada defendan untuk menyangkal bukti amaun yang dituntut (lihat perenggan 11).
- D**
- (4) Tidak terdapat apa-apa yang mencadangkan terdapat kesalahan yang nyata dalam sijil tersebut atau sebarang fraud yang dapat dikemukakan. Dalam keadaan ini dan mengikut autoriti-autoriti, kami berpegang teguh bahawa jawapan kepada soalan yang pertama adalah positif sementara jawapan kepada soalan kedua terpaksa dijawab sebagai negatif (lihat perenggan 13).]
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Notes

For a case on the effect of conclusive evidence clause, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 639.

- F** For cases on certificate of indebtedness conclusive, see 2(2) *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 6256–6257.
 For cases on guarantees, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2139–2184.

G Cases referred to

- Bank of Commerce (M) Bhd v Tan Boon Soon @ Tan Po Lo trading as Messrs Syarikat Soon Tatt Trading & Anor* [1995] 1 AMR 156 (refd)
Chen Heng Ping & Ors v Intradagang Merchant Bakers (M) Bhd [1995] 2 MLJ 363 (refd)
Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282 (folld)
H *D & C Nomura Merchant Bankers Bhd v Gunung Kuari Sdn Bhd* [1990] 2 CLJ 58 (refd)
Dobbs v National Bank of Australiasia (1953) 53 CLR 643 (refd)
National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300 (refd)
Supreme Leasing Sdn Bhd v Dior Enterprises & Ors [1990] 2 MLJ 36 (folld)

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Legislation referred to

Rules of the High Court 1980 O 14 r 2

K Anantham (Chee Yoke Yung and Nadrah bte Mohamed with him) (Shatar Tan & Chee) for the appellant.
SL Tan (SL Tan & Associates) for the respondent.

Steve Shim CJ (Sabah & Sarawak) (delivering judgment of the court):

[1] Leave to prosecute this appeal was granted by this court on 23 March 2004 upon the following two questions:

- (1) whether a certificate of indebtedness issued in accordance with the express provisions of the contract which provide that the certificate is final and conclusive of the matters stated therein is final and conclusive evidence of the amount in the absence of any manifest error on the certificate;
- (2) whether apart from producing a certificate of indebtedness pursuant of the contract which provided that the certificate was final and conclusive of the matters stated therein, the appellant had a further obligation to produce statements of account to prove the debt in an application for summary judgment.

[2] As a preliminary note, we should mention that by a vesting order dated 22 December 2000, the business of Cempaka Finance Bhd (the appellant herein) was taken over by United Finance Bhd which in turn, on 25 June 2001, changed its name to Southern Finance Bhd. Under a loan agreement dated 17 July 1996, the appellant agreed to grant the first respondent a fixed loan of RM1.5m. In consideration, the second respondent signed a guarantee agreement on the same date. The first respondent defaulted. In consequence, the appellant filed a suit against both respondents in the High Court on 29 May 1998. Thereafter, on 19 April 1999, the appellant filed a summons in chambers under O 14 of the Rules of the High Court 1980 for summary judgment. The matter came before the senior assistant registrar who, on 17 August 1999, granted an order in terms of the application. The respondents then appealed to the judge in chambers. The judge upheld the decision of the senior assistant registrar. On further appeal by the respondents, the Court of Appeal reversed the decision of the High Court.

[3] It seems clear that the central issue canvassed before the judge in chambers relates to the questions now postulated for our consideration. The questions concern specifically the certificate of indebtedness found in cl 27 of the loan agreement and in cl 7.03 of the guarantee agreement. Now cl 27 stipulates

If and when the loans shall be withdrawn or revoked and/or the said account or accounts whatsoever in respect thereof shall be closed, a statement by the director, general manager, manager, assistant manager, sub-manager, secretary, accountant or any other duly authorized officer or agent of the lender for the time being as to the amount of such balance and the money and liabilities for the time being incurred or due to the lender by or from the borrower(s) shall be accepted by the borrower(s) and/or any person or persons deriving title from the borrower(s) and/or the successors in title and assigns of the borrower(s) as final and conclusive evidence for all purposes whatsoever including for purposes of legal proceedings.

A And cl 7.03 stipulates:

It is hereby agreed that any admission or acknowledgment in writing by the borrower(s) or any authorized person on behalf of the borrower(s) or a statement of account in writing showing the indebtedness of the borrower(s) in relation to the subject matter of this agreement duly certified by an authorized officer of the lender shall be binding and conclusive against the guarantor(s) and his heirs, executors, personal representatives and successors

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[4] In this connection, the appellant had relied on the two clauses to establish the conclusiveness of the certificate of indebtedness in support of its application for summary judgment under O 14 of the Rules of the High Court 1980. Therein, the High Court held that the certificate of indebtedness, exh P3, certified by a duly authorised officer of the appellant was binding as to quantum and liability relying, it seems, on the case of *Chen Heng Ping & Ors v Intradagang Merchant Bakers (M) Bhd* [1995] 2 MLJ 363. It further held that there was no manifest error on the face of the said certificate nor was there any fraud. As such, there were no triable issues involved. The application was therefore granted in terms. However, on appeal by the respondents, the Court of Appeal took a different stand. That stand has been attacked in this court by the appellant on two fronts. The first is that the Court of Appeal has erred in law in not giving effect to the principles relating to summary judgment applications set out in *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 and requiring further proof from the appellant of the respondents' indebtedness. This is obviously directed at the following passage of its judgment:

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Thus, a plaintiff would be entitled to obtain summary judgment without trial if he can prove his case clearly which to us would mean that the plaintiff has to establish the existence of certain facts and must prove that those facts exist before the court can determine the issue as to whether the defendant has a defence or has raised an issue against the claim which ought to be tried.

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[5] Quite clearly, the Court of Appeal has put the burden on the plaintiff to prove his case in an O 14 application. With respect, that cannot be the correct proposition of law. In an application under O 14, the burden is on the plaintiff to establish the following conditions: that the defendant must have entered appearance; that the statement of claim must have been served on the defendant; that the affidavit in support must comply with r 2 of O 14 in that it must verify the facts on which the claim is based and must state the deponent's belief that there is no defence to the claim (see *Supreme Leasing Sdn Bhd v Dior Enterprises & Ors* [1990] 2 MLJ 36). Once those conditions are fulfilled, the burden then shifts to the defendant to raise triable issues. The law on this is trite. In *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300, the Federal Court has stated thus:

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I We think it appropriate to remind ourselves once again that in every application under O 14, the first considerations are (a) whether the case comes within the order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under O 14. For the purposes of an application under O 14, the preliminary requirements are:

(i) the defendant must have entered an appearance;

(ii) the statement of claim must have been served on the defendant; and

(iii) the affidavit in support of the application must comply with the requirements of r 2 of the O 14.

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... If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. This burden then shifts to the defendant to satisfy the court why judgment should not be given against him.

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[6] The proposition of law enunciated by the Federal Court in *National Company* has been applied in numerous cases. We accept the correctness of that proposition. In reversing the burden of proof as the Court of Appeal in the instant case has done, it has, in our respectful view, misapplied the relevant principles relating to an application for summary judgment under O 14 of the Rules of the High Court 1980.

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[7] We now turn to the second broadside launched by the appellant. Here, the appellant contends that the Court of Appeal has erred in law in not giving effect to cl 27 of the loan agreement entered into between the appellant and the first respondent and cl 7.03 of the guarantee agreement between the appellant and the second respondent, described as the conclusive evidence clauses. This relates to the following passage in the judgment of the Court of Appeal which states:

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The sole question before us is whether the respondent had sufficiently established their case against the appellants, namely, that the appellants as at 29 November 1997 owed the respondent the said sum of RM1,554,019.74. We do not think so. Exhibit P3 would only be conclusive evidence if it had been illustrated in the respondent's affidavit in support of their application for summary judgment as to how the sum mentioned therein was arrived at. It is our view that the mere production of exh P3 was insufficient to show that the respondent had clearly established that the said sum was due and owing. The court cannot just assume that the amount shown therein is correct. No documentary evidence such as in the form of monthly statement of accounts and the amount of interest imposed on the monies released were introduced by the respondent. Under the circumstances, we cannot come to the conclusion that the respondent had clearly proven their case. ... All the said documents showed is that the said facility was granted to the first appellant with the second appellant as the guarantor. What we were gravely concerned with is whether the evidence introduced up to now is sufficient prima facie to establish the respondent's case. The law on the burden of proof is governed by the provisions found in Chapter VII of Part III of the Evidence Act 1950. In accordance with s 101 of the Act, the legal burden of establishing that the said sum stated in exh P3 is owing from the appellants to the respondent lie on the latter. The conclusiveness of exh P3 is binding only upon the parties. The court would still have to determine whether sufficient evidence has been adduced to prove the quantum and correctness of the amount claimed by the respondent.

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[8] The Court of Appeal thereafter cited in support the High Court case of *Bank of Commerce (M) Bhd v Tan Boon Soon @ Tan Po Lo trading as Messrs Syarikat Soon Tatt Trading & Anor* [1995] 1 AMR 156.

[9] Although the case of *Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363 (CA), was relied on by the High Court in holding a certificate of indebtedness to be binding unless manifest error on the face of it or fraud is shown, the Court of Appeal in the instant case, seems to place no significance on this. Nor has it considered the fact that in *Chen Heng Ping*, the court was able to

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- A distinguish the factual peculiarities in *Bank of Commerce*. It was a case where an error was manifested on the face of the certificate of indebtedness because the guarantee agreement had limited the guarantor's liability to RM140,000 whereas the suit had claimed for RM259,000. Indeed, the Court of Appeal in *Chen Heng Ping* cited with approval the observation expressed by VC George J in *D & C Nomura Merchant Bankers Bhd v Gunung Kuari Sdn Bhd* [1990] 2 CLJ 58 when he said at p 60:
- B ... it was agreed that a certificate of indebtedness by an authorised officer of the plaintiff shall be binding and conclusive against the guarantors of the amount payable by the first defendant.
- C In the instant case, there is such a certificate of indebtedness under the hand of an authorised officer of the plaintiff bank. The judgment of Shankar J in *MIMB v G & C Securities* (unreported) and the judgment of *Bank Bumiputra Malaysia Bhd v Doric Development Sdn Bhd* [1988] 1 MLJ 462, at p 463 provided authority for the proposition that such a certificate is indeed binding unless there is manifest error.
- D [10] This observation appeared to have escaped the attention of the Court of Appeal in the present case. In the result, the Court of Appeal took the position that the conclusiveness of the certificate of indebtedness ex P3 was binding only upon the parties and that the court would still have to determine whether sufficient evidence had been adduced to prove quantum and the correctness of the amount claimed. With respect, such a proposition goes against the entrenched principles enunciated by Raja Azlan Shah CJ (Malaya) (as His Highness then was) in *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 when he said, inter alia:
- E We have often said in this court many a time that where the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the assistant registrar or the judge in chambers, or, for that matter, this court shall not deal with the whole matter under the RSC O 14 procedure. In the present case, the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents. ... It means that, for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate.
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- G [11] The above dictum establishes firmly the conclusive nature and extent of a certificate of indebtedness. A certificate of indebtedness operates in the field of adjectival law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disprove the amount claim.
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- I [12] In the instant case, the relevant cll 27 and 7.03 of the loan agreement and guarantee agreement respectively are sufficiently clear. A clause of this nature has been described as a conclusive evidence clause. Such a clause has been held to be binding and valid by courts in Australia and England. In *Dobbs v National Bank of Australasia* (1953) 53 CLR 643, the Australian court made the following observation which we think is instructive:
- ... The bank could recover without the production of a certificate if, by ordinary legal evidence, it proved the actual indebtedness of the customer. But the (conclusive evidence) clause, if valid, enables the bank by producing a certificate to dispense with such proof.

It means that for the purpose of fixing the liability of a surety, the customer's indebtedness may be ascertained conclusively by a certificate. ... But the manifest object of the clause was to provide a ready means of establishing the existence and amount of the guaranteed debt and avoiding an inquiry upon legal evidence into the debits going to make up the indebtedness.

[13] The certificate of indebtedness, exh P3, issued in accordance with cll 27 and 7.03 aforesaid, are lucid enough. There is nothing to indicate or suggest any manifest error on the face of the said certificate nor is any fraud shown. In the circumstances and given the authorities cited, we take the firm view that the answer to the first question must be in the affirmative whereas the second question has to be answered in the negative. Having considered the questions in the context of the established facts, it is appropriate, we think, to allow this appeal with costs. Deposit to the appellant to account of taxed costs.

Appeal allowed.

Reported by Sally Kee

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